

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of  
Exxon Company, U.S.A., for Review  
of Resolution No. 73-2 of the  
California Regional Water Quality  
Control Board, Los Angeles Region

Order No. WQ 73-15

BY THE BOARD:

On March 26, 1973, Exxon Company, U.S.A. (Petitioner), petitioned the State Water Resources Control Board (State Board), for review of Resolution No. 73-2 of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board), adopted February 28, 1973. Resolution 73-2 requests the Attorney General to petition the superior court to impose, assess and recover civil monetary remedies as provided by Water Code Section 13350(a)(3). Additionally, the Petitioner requests a stay of Resolution No. 73-2 pending review by the State Board.

The petition requests the State Board to review and find inappropriate and improper the Regional Board's action in adopting Resolution No. 73-2 on the basis that the proceeding before the Regional Board did not constitute a fair hearing, that the State has made a binding election of remedies by recovery of damages under Section 151 of Harbors and Navigation Code, and that the facts of the case do not warrant successive state actions against Petitioner.

The State Board has considered the petition and reviewed the record of the Regional Board relating to Resolution No. 73-2 and for the reasons stated below finds that the Regional Board's action in adopting the resolution was appropriate and proper.

## BACKGROUND

On November 27, 1972, as a result of a line break, oil was discharged into Los Angeles Harbor. On February 28, 1973 a hearing was held by the Regional Board pursuant to Water Code Section 13350(b) which requires that a hearing be held before a regional board requests the Attorney General to petition the superior court to impose civil penalties for an oil spill, as provided in Section 13350(a).

Petitioner appeared at the hearing and evidence was received. After the hearing the Board adopted Resolution No. 73-2. Petitioner does not dispute that a discharge of oil into the harbor occurred or that the discharge resulted from a break in Petitioner's pipeline.

## CONTENTIONS AND FINDINGS

The specific contentions of the Petitioner and our findings relative thereto are as follows:

Contention: The hearing conducted on February 28, 1973, did not constitute a fair hearing in that the hearing procedure was intended to and did preclude consideration by the Regional Board of essential facts, such as the harm, if any, caused by the oil spill of Petitioner and the corrective action taken by the Petitioner.

### Finding

Water Code Section 13350(a) provides:

"Any person who... (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other provisions of this division, may be liable civilly in a sum of not to exceed six thousand dollars (\$6,000.) for each day in which such violation or deposit occurs."

The statute imposes strict liability upon any person who is found to have caused or permitted the deposit of any oil or product of petroleum in or on any waters of the State unless the deposit is permitted by waste discharge requirements or other provisions of Division 7 of the Water Code. The basic issues necessary for a regional board to consider with respect to an oil spill are:

- (1) Whether any person did in fact cause or permit any oil or petroleum product to be deposited in or on any state water;
- (2) whether such deposit was permitted by waste discharge requirements or other provisions of Division 7 of the Water Code.

In the case of an oil spill, in addition to the two basic issues involved in a determination of probable liability, a question of regional board discretion is presented. Water Code Section 13350(b) provides that the Attorney General, "upon request of a regional board or the state board, shall petition the superior court to impose, assess and recover such sums." Such request is to be made only after a hearing, with due notice of the hearing given to all affected persons. We believe these provisions imply some discretion on the part of a regional board whether or not to refer a case involving an oil spill to the Attorney General for action under Section 13350(a)(3). Certainly, the statute does not indicate an intent to require the regional boards to request the Attorney General to take action in all cases of an oil spill without regard to the circumstances. Section 13350(b) directs the court, in determining the amount to be imposed, to take into consideration "all relevant circumstances, including but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs and corrective action, if any, taken by the discharger."

It would seem reasonable and appropriate for a regional board to give consideration to one or more of these same items before deciding whether a particular incident is of sufficient significance to justify the time and expense necessary to bring it to a court's attention.

This is not to say that once the fact of an oil spill and the identity of the responsible person have been established the regional board cannot and should not control the nature and extent of further evidence. Such evidence should go no further than to establish that the oil spill was not trivial and that the circumstances justify requesting the court to impose some penalty. Evidence upon which to base the amount of the penalty should be presented to the court, not the board.

In this particular case, counsel for the Petitioner was properly advised during the hearing that reference to the Attorney General was discretionary with the Regional Board (RT p. 135, lines 3-7). He was in fact permitted to enter evidence on magnitude of discharge, resultant harm, corrective actions, the manner in which the spill occurred, and prior efforts by the discharger to protect water quality (RT pp. 29-40). Not only was this evidence introduced, it was obviously considered by the Regional Board (RT p. 38, lines 3-22).

Contention: The negotiation and assessment of a \$6,000 civil penalty in favor of the State of California in full settlement of an alleged violation of Section 151 of the Harbors and Navigation Code involving the same petroleum discharge constituted an election of remedies on the part of the State, and no further prosecution is permissible.

Finding:

Petitioner's contention is wholly without merit. The doctrine of election of remedies bars only inconsistent remedies. Where remedies are consistent and concurrent, the doctrine is unavailable.

Section 13350(a)(3) of the Water Code and Section 151 of the Harbors and Navigation Code are consistent and concurrent remedies recognizing legislative concern over a major threat to the State's waters through deposits and spillages of oil.

Petitioner argues that either Section 13350(a)(3) of the Water Code or Section 151 of the Harbors and Navigation Code may be the basis of recovery but that, once recovery has been made under one section, no further recovery is available. This argument is directly contradictory to the specific terms of the statutes involved. At the time of adopting Section 151, the Legislature specifically provided:

"This act shall not be construed to limit or prevent any other agency or governmental authority from enforcing this act or any other provision of law." (Stats. 1968, Ch. 1259, Sec. 2. Emphasis supplied).

Section 13350(d) specifically provides:

"Remedies under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal."

We must presume that, when Section 13350 was amended in 1971 to permit civil monetary penalties to be assessed under Section 13350(a)(3) for an oil spill, the Legislature was aware of Section 151 Harbors and Navigation Code. The addition of Section 13350(d) seems to make this doubly clear, and also serves to reinforce the legislative intent that recovery under Section 151 will not bar recovery under Section 13350(a)(3), and vice versa. We concur with the apparent legislative determination that an oil spill may occasion distinctly different types of damage, e.g., damage to navigability and damage to water quality, and that full recompense for such damages may require recovery under both Section 151 Harbors and Navigation Code and Section 13350 Water Code.

Contention: The facts of this case do not warrant successive state actions.

Finding:

Petitioner argues that the minor extent of damage resulting from the petroleum discharge and the immediate corrective actions by Petitioner to abate the discharge and its effects should be considered as mitigating factors and that, under these circumstances, it is wholly unnecessary for the State to further prosecute Petitioner in connection with the petroleum discharge in question. This argument is closely related to the first contention of Petitioner. As we have already

pointed out, the regional boards have discretion on whether to refer a specific petroleum discharge to the Attorney General. In exercising this discretion, the regional boards are governed by their own common sense in interpreting the facts of a particular case and by considerations of public policy and protection of public interest. Section 13350(b) specifically provides that it is within the province of the superior court to consider all relevant circumstances of the petroleum discharge, including but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs and corrective action, if any, taken by the discharger. This section does not require that the regional board take these circumstances into consideration, although, as already discussed, a regional board certainly has the discretion to consider these circumstances. In this case, these circumstances were considered by the Regional Board.

Since the question of reference to the Attorney General is a discretionary power of the regional boards, we will overturn the decision of a regional board on this issue only where there is clear abuse of discretion. Having reviewed the record, we are unable to find that the Regional Board abused its discretion in this case.

#### CONCLUSIONS

Based on the record before the Regional Board, the State Board concludes that the action of the Regional Board in adopting Order No. 73-2 was appropriate and proper.

IT IS HEREBY ORDERED that the petition of Exxon Company, U.S.A., including its request for stay, be, and it is denied.

Dated: May 17, 1973

*W. W. Adams*

W. W. Adams, Chairman

*Ronald R. Robie*

Ronald R. Robie, Vice Chairman

**ABSENT**

Roy E. Dodson, Member

*Mrs. Carl H. Auer*

Mrs. Carl H. (Jean) Auer, Member

*W. Don Maughan*

W. Don Maughan, Member